



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 13, 1995

Mr. Herbert L. Prouty  
General Counsel  
El Paso Water Utilities  
Public Service Board  
P.O. Box 511  
El Paso, Texas 79961-0001

OR95-1409

Dear Mr. Prouty:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 30552.

The El Paso Water Utilities Public Service Board (the "board") has received several requests for information relating to two properties that the board seeks to purchase. One of the requestors seeks all information relating to the board's intent to purchase the "Old Powell Farm" in Van Horn, Texas. The other requestor seeks "copies of the motions, the minutes and all other documents considered by the Public Service Board in its deliberations taken on Agenda Item No. 10 of its Regular Board Meeting of December 14, 1994," and the following information:

1. All of the documents related to the purchase of the Antelope Valley Ranch in Jeff Davis County, Texas, by the [board], including, but not limited to:
  - a. all geological or hydrological reports;
  - b. all economic, environmental, technical, or engineering assessments, studies, reports or analyses;
  - c. all surveys and maps;
  - d. all contracts of any nature;

- e. all "closing documents," deeds, deeds of trust, bonds, security agreements, or other financial documents.

You advise us that some of the requested information has been made available to the requestors. You have submitted the remaining information to us for review (exhibits W-1 through W-16 and A-1 through A-15) and claim that sections 552.101, 552.105, 552.107, 552.110, 552.111, and 552.113 of the Government Code except it from required public disclosure.<sup>1</sup>

We first address your assertion that section 552.101 of the Government Code excepts the requested information from required public disclosure. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You cite no authority in conjunction with your assertion of section 552.101. In addition, we are not aware of any law that makes the submitted information confidential. Accordingly, we conclude that the board may not withhold the requested information under section 552.101 of the Government Code.

Next, we address your assertion that section 552.105 of the Government Code excepts exhibits W-2, W-7, W-8, W-9, and W-10 from required public disclosure. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). Because this exception extends to "information pertaining to" the location, appraisals, and purchase price of property, it may protect more than a

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<sup>1</sup>You indicate that the board is unclear as to whether exhibit A-15 falls within the scope of the requests. Where a governmental body has been presented with an unclear request for information, the governmental body may advise the requestor of the types of information available so that he may properly clarify his request. See Open Records Decision Nos. 561 (1990) at 8-9, 31 (1974). Moreover, the governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). The scope of a request is a fact question. This office may not resolve fact questions. See, e.g., Attorney General Opinion DM-98 (1992) at 3. We understand that the board has unsuccessfully sought clarification from the requestors as to whether exhibit A-15 falls within the scope of the requests. We will consider exhibit A-15 to be within the scope of the requests until such time as the requestors indicate otherwise.

specific appraisal report prepared for a specific piece of property. Open Records Decision No. 564 (1990) at 2. For example, this office has concluded that appraisal information about parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. *Id.* A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 (1982) at 3 (quoting Open Records Decision No. 222 (1979)).

You advise us that the board's negotiations to purchase the two properties are not complete and will be impaired if the aforementioned exhibits are disclosed. We have examined the documents submitted to us for review and conclude that the board has made a good faith determination that release of exhibits W-2, W-7, W-8, W-9, and W-10 would damage its negotiating position with respect to the purchase of the property. Accordingly, exhibits W-2, W-7, W-8, W-9 and W-10 may be withheld from required public disclosure under section 552.105 of the Government Code.

You also claim that section 552.107(1) of the Government Code excepts from required public disclosure information contained in exhibits W-3, W-4, W-5, W-6, W-13, and W-14, and exhibits A-1 through A-11. Section 552.107(1) excepts information from disclosure if "it is information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. *See* Open Records Decision No. 574 (1990).

You have submitted to us for review numerous records that detail communications between the board and its attorneys. You indicate that the information that you have marked in these records represent the legal advice of the board's attorneys. We have examined the marked information and conclude that most of it falls within the protection of section 552.107(1) of the Government Code and need not be made available to the requestors. You may not withhold the marked portions of exhibit A-7 under section 552.107; however, as discussed below, you may withhold the marked portions under section 552.111.

You also claim that section 552.110 of the Government Code excepts some of the requested information from required public disclosure. Specifically, you claim that section 552.110 protects exhibits W-1, W-10, A-12, A-13, A-14, and A-15. Section 552.110 protects the property interests of private persons by excepting from required public disclosure trade secrets. Pursuant to section 552.305 of the Government Code, we have notified the parties whose proprietary interests are implicated by this request. We have received no response. When an agency or company fails to provide relevant information regarding factors necessary to make a section 552.110 claim, a governmental

body has no basis for withholding the information under section 552.110.<sup>2</sup> See Open Records Decision No. 402 (1983) at 2. Accordingly, the board may not withhold the aforementioned exhibits under section 552.110 of the Government Code.

Next, we consider whether section 552.111 of the Government Code excepts the marked portions of exhibits W-11, W-12, W-15, W-16, A-3, A-4, A-6, A-7, A-8, A-10, A-12, A-13, and A-14 from required public disclosure.<sup>3</sup> Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In a recent opinion that reexamined section 552.111, this office concluded that it excepts from public disclosure "only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency, however, "do not encompass routine internal administrative and personnel matters." *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.*

We have examined the information in exhibits W-11, W-12, W-15, W-16, A-3, A-4, A-6, A-7, A-8, A-10, A-12, A-13, and A-14 that you have marked as excepted under section 552.111. This information relates to the board's efforts to acquire certain properties for water development purposes. We believe that most of the information that you have marked constitutes advice, recommendations, opinions, and other material reflecting the board's efforts to acquire the properties. You may therefore withhold most of the marked information under section 552.111. We have marked the information which is generally factual in nature that you may not withhold under section 552.111.

Finally, we consider whether section 552.113 of the Government Code excepts exhibits W-11, W-12, W-15, W-16, A-12, A-13, and A-14 from required public disclosure.<sup>4</sup> Section 552.113 excepts from required public disclosure:

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<sup>2</sup>Section 552.110 also excepts commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. See Open Records Decision No. 592 (1991). Neither the board nor the parties whose property interests are implicated by this request have cited, nor are we aware of, any statute or judicial decision that makes any of the requested information privileged or confidential.

<sup>3</sup>You also claim that section 552.111 excepts information contained in exhibits W-2 through W-10, W-13, W-14, and A-1 through A-11. We do not consider the applicability of section 552.111 to the portions of those exhibits that you may withhold under the other exceptions to required public disclosure. However, as discussed above, you may withhold under section 552.111 the portions of exhibits A-3, A-4, A-6, A-7, A-8, and A-10 for which you claim only section 552.111.

<sup>4</sup>You also assert section 552.113 with respect to exhibits W-8, W-9, and W-10. However, because we conclude that section 552.105 of the Government Code excepts these exhibits from required public disclosure, we need not address the applicability of section 552.113 to these exhibits at this time.

(1) an electric log confidential under Subchapter M, Chapter 91, Natural Resources Code; or

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency.

In Open Records Decision No. 627 (1994) (copy enclosed), this office concluded that section 552.113(2) protects from public disclosure only (i) geological and geophysical information regarding the exploration or development of natural resources that is (ii) commercially valuable. Open Records Decision No. 627 (1994) at 3-4 (overruling rationale of Open Records Decision No. 504 (1988)). The decision explained that the phrase "information regarding the exploration or development of natural resources" means "information indicating the presence or absence of natural resources in a particular location, as well as information indicating the extent of a particular deposit or accumulation." *Id.* at 4 n.4. However, you may not withhold under section 552.113(2) general geological information about a particular location that is unrelated to the "presence or absence of natural resources."

You have marked the information in exhibits W-11, W-12, W-15, W-16, A-12, A-13, and A-14 that you seek to withhold under section 552.113(2). We conclude that, except for the general geological information, this information is geological and geophysical information regarding the exploration and development of natural resources. We are unable to determine whether this information is commercially valuable to the current owner of the properties at issue or to another party. You may withhold the information under section 552.113(2) if you determine that the information is commercially valuable; otherwise, the information must be disclosed.


In summary, the board may withhold exhibits W-2, W-7, W-8, W-9, and W-10 under section 552.105 of the Government Code; the portions you have marked in exhibits W-3, W-4, W-5, W-6, W-13, and W-14, exhibits A-1 through A-6, and A-8 through A-11 under section 552.107(1) of the Government Code; and the portions you have marked in exhibits W-11, W-12, W-15, W-16, A-3, A-4, A-6, A-7, A-8, A-10, A-12, A-13, and A-14 under section 552.111 of the Government Code. In addition, you may withhold the information you have marked in exhibits W-11, W-12, W-15, W-16, A-12, A-13, and A-14 under section 552.113(2) if you determine that the information is commercially valuable. The board must release exhibits W-1 and A-15 in their entirety.<sup>5</sup>

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<sup>5</sup>You advise us that exhibit A-14 was made available to the Texas Water Development Board. You ask whether such disclosure requires the board to disclose the information to the requestors. Section 552.007 prohibits a governmental body from selectively disclosing to the public information that is not confidential by law but that a governmental body may withhold under an exception to section 552.021(a) of the Government Code. See also Open Records Decision No. 463 (1987) at 1-2. However, information excepted from disclosure under the Open Records Act may be transferred between state agencies without resulting in a waiver of the act's discretionary exceptions. See Attorney General Opinion M-713 (1970) (interagency sharing of data is not a public disclosure of the data); Open Records Decision No. 516 (1989).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Records Division

LRD/GCK/rho

Ref.: ID# 30552

Enclosures: Marked documents  
Open Records Decision No. 627 (1994)

cc: Mr. Joe Roberts  
President  
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(w/o enclosures)

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(Footnote continued)

Therefore, the release of exhibit A-14 to the Texas Water Development Board is not a selective disclosure for purposes of section 552.007 of the Government Code.